

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of:

David L. Titus

EB Docket No. 07-13

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UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

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PRE-TRIAL HEARING

IN THE MATTER OF:

DAVID L. TITUS,

Amateur Radio Operator
and Licensee of
Amateur Radio
Station KB71LD

EB Docket No.
07-13

FRN No.
0002074797

File No.
EB-06-IH-5048

Tuesday,
March 11, 2008

VOLUME 4

Federal Communications
Commission
Room TW A-363
445 12th Street, S.W.
Washington, D.C.

The above-entitled matter came on
for pre-trial conference, pursuant to
notice, at 9:00 a.m.

BEFORE:

RICHARD L. SIPPEL
Chief Administrative Law Judge

APPEARANCES:On Behalf of the Applicant:

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P-R-O-C-E-E-D-I-N-G-S

9:04 a.m.

ADMIN. JUDGE SIPPEL: Okay. This is a pre-hearing conference that was called at my order, FCC-08M-15, release March 7, 2008, prompted in part by a, I'll call it a discussion I was having in connection with a subpoena -- subpoena for Mr. Titus.

And by the way, I wanted to say good morning to everybody and I know that your appearances have all been given to the Court Reporter, I take it?

MR. SCHONMAN: Yes, Your Honor.

ADMIN. JUDGE SIPPEL: Okay.

And some questions came up. And I've indicated what they are in the order. And the first is with respect to -- well, whether or not we needed an admission session.

And in light of some of these questions that have come up about the expert testimony, the scope of the testimony, that particularly that the Bureau is interested in

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1 bringing forth to Mr. Shilling that maybe it
2 would be helpful to take the time to go
3 through his testimony and, of course, other
4 testimony too, with some indubriative care in
5 advance of the hearing, primarily I think in
6 order to -- well, it's a clear way of doing
7 things but also it's going to facilitate
8 things when the witnesses show up.

9 That's my thinking. I'm not hard
10 and fast on this yet.

11 Let me get the views of the
12 Bureau.

13 MR. SCHONMAN: Well, Your Honor,
14 the Bureau would not have any problem with
15 having an admission session prior to the
16 commencement of testimony.

17 ADMIN. JUDGE SIPPEL: Of the
18 testimony.

19 MR. LYON: And I was a part, Your
20 Honor.

21 ADMIN. JUDGE SIPPEL: Okay. Well,
22 then it seems to be almost unanimous.

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1 Too many footnotes from the
2 Bureau. Qualifiers. Okay. But you're no
3 problem with it.

4 Let's pick a date then. Can we do
5 it the day before -- the hearing is set for
6 the 15th which is a Tuesday? And that's
7 primarily to accommodate out of town witnesses
8 getting in.

9 What about the 14th? Can we do it
10 the day before?

11 MR. LYON: Your Honor, I would
12 have no problem with that. The only concern
13 that I have is, depending upon your rulings,
14 I may not need to engage rebuttal witnesses
15 and my client is very anxious to engage those
16 witnesses now because they're in the nature of
17 an expert, at least one is. Two are in the
18 nature of expert witnesses and would be
19 preparing written testimony in response to Mr.
20 Shilling's testimony.

21 So, if possible, I'd like to have
22 it as early as possible. Maybe even early

1 next week.

2 ADMIN. JUDGE SIPPEL: Well, I
3 won't be here early next week.

4 As I said, I'm going to be out of
5 the country on a long-planned trip for which
6 I have tickets and all that sort of thing so--

7 MR. SCHONMAN: Your Honor, the
8 Bureau has no problem having the admission
9 session the day before the commencement of the
10 hearing. I think that's entirely appropriate.

11 ADMIN. JUDGE SIPPEL: Well, it
12 certainly accommodates me. Let me ask it this
13 way then.

14 If we do it on the 14th, you would
15 need time, you say depending on how it came
16 out, you would need time, you feel, to get to
17 prepare rebuttal witnesses with testimony.

18 Suppose we gave a, you know, an
19 adequate recess in between the close of the
20 cases in chief and any rebuttal to give you
21 time to do that? Might even be better.

22 MR. LYON: It's possible, Your

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1 Honor. I think the likelihood would be I
2 would go ahead and engage the rebuttal
3 witnesses and distribute the written testimony
4 to the Bureau in advance of the hearing
5 itself. It's probably more cost-effective to
6 my client that way than scheduling two
7 separate hearing sessions.

8 But, you know, it's probably six
9 of one and half a dozen of another.

10 ADMIN. JUDGE SIPPEL: Well, yes.
11 I mean, it just doesn't seem to be that
12 pressing. I mean, actually, I mean, I'd feel
13 I could, you know, open this case up on the
14 15th and just take more time with the written
15 evidence which is what we planned to do to
16 begin with. We planned to do that to begin
17 with. But, I mean, you've made a point. I
18 think you made a good case for an admission
19 session. It's not a major -- it's a major
20 case. Of course, it's a major case, but I
21 mean, it's not a big case in the sense of
22 volume.

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1 MR. LYON: Why don't we do it on
2 the 14th, Your Honor. I would anticipate we
3 could get it done in an hour or two and I
4 think you're just going to go ahead and engage
5 my -- my rebuttal witnesses. If it's not
6 needed then that's even better for me.

7 ADMIN. JUDGE SIPPEL: Well, if
8 they don't have -- certainly, if they just
9 have to put -- well, you said it. That's good
10 enough. Let's do it.

11 Let's set it for 9:30 on the 14th.
12 Is that all right?

13 MR. SCHONMAN: Yes, sir.

14 ADMIN. JUDGE SIPPEL: And we'll do
15 it, you know, as rapidly as we can. But if it
16 takes all day, it takes all day, whatever it
17 takes.

18 Now, as I say, this interest in an
19 admission session was prompted by a closer
20 focus with respect to what the Bureau intends
21 to offer as evidence through Mr. Shilling.
22 And that's when the question came up about

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1 rebuttal. This is all in connection now with
2 an ex-parte application for a subpoena so
3 there was nothing we, you know, the
4 conversation stopped very quickly and I told
5 them I was going to schedule a pre-hearing.

6 But the fact is that the issue is
7 there and as a question, not as an issue in
8 the case. And that is, there was a procedure
9 set for the proffer and preparation of expert
10 witnesses. And Mr. Titus came forward and he
11 did it as it was laid out to do.

12 The Bureau hasn't done that and
13 then again, the Bureau was not proffering Mr.
14 Shilling as an expert as I read your -- I
15 guess it's -- what is the nature of the
16 document we're talking about? Was it a
17 response to the subpoena request? I think it
18 was. No.

19 MR. LYON: I think it was in
20 response to witness notification.

21 ADMIN. JUDGE SIPPET: Yes.
22 Anyway.

1 The fact remains is I did --
2 believe me, I read the document very
3 carefully. I have it here some place. But
4 that's neither here nor there. But what's the
5 Bureau's position on this? I mean, is this
6 Mr. Shilling going to testify for you as an
7 expert do you think?

8 MR. SCHONMAN: Detective Shilling
9 is primarily a fact witness.

10 ADMIN. JUDGE SIPPEL: Yes.

11 MR. SCHONMAN: But he is also
12 regarded nationally and internationally as an
13 expert in the field of sex offenders,
14 particularly sex offenders who have been
15 released from prison and their likelihood of
16 reoffense.

17 ADMIN. JUDGE SIPPEL: What is he
18 trained in? He's trained in detective work.
19 Right?

20 MR. SCHONMAN: Your Honor, his
21 training and experience is extensive in this
22 area. And one of the exhibits that the Bureau

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1 will proffer at trial is his curriculum vitae
2 which --

3 ADMIN. JUDGE SIPPEL: Well, he's
4 given a lot of lectures.

5 MR. SCHONMAN: Which will be
6 Bureau Exhibit Number 3, and it runs no fewer
7 than 17 pages about consulting with state
8 legislatures appearing on panels in his
9 position as a very experienced individual in
10 the area of sex offenders as they relate to
11 their recidivism.

12 I think if Mr. Lyon wants to
13 engage in voir dire of Detective Shilling,
14 he's certainly entitled to do that. But I
15 think there will be no question about his
16 status as an expert regarded by several courts
17 already that he's an expert in the fields I
18 described.

19 MR. KNOWLES-KELLETT:
20 He's not our expert though, Your Honor, in
21 that he's the police officer with jurisdiction
22 over Mr. Titus. He heads up the sex offender
unit that oversees Mr. Titus. So, we didn't

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1 go out and retain or employ him. He's not a
2 hired gun expert like Mr. Lyon's expert.

3 ADMIN. JUDGE SIPPEL: Well, I
4 don't want to hear that term used again.
5 That's not fair to Mr. Titus. Mr. Titus has
6 got a very qualified person who he is paying
7 good money to do his job.

8 MR. SCHONMAN: Yes. Your Honor,
9 the point is that --

10 ADMIN. JUDGE SIPPEL: He's not an
11 economic professor coming in --

12 MR. SCHONMAN: We haven't retained
13 Detective Shilling to appear as an expert on
14 our behalf. We're not paying him.

15 ADMIN. JUDGE SIPPEL: I understand
16 that.

17 MR. SCHONMAN: And we --

18 ADMIN. JUDGE SIPPEL: No. No. I
19 understand that.

20 MR. SCHONMAN: Mr. Knowles-Kellett
21 didn't mean anything derogative about --

22 ADMIN. JUDGE SIPPEL: He used a

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1 derogatory term.

2 MR. SCHONMAN: We apologize.

3 ADMIN. JUDGE SIPPEL: He can tell
4 me what he meant. But I know. I mean, I'm
5 not holding against anybody. I just don't
6 want to hear it again, that's all.

7 MR. SCHONMAN: Understood.

8 ADMIN. JUDGE SIPPEL: Because, you
9 know, things get lost.

10 Anyway, let me come back to this
11 though.

12 It just seems like the Bureau is
13 trying to have it both ways. You say, he's
14 primarily a fact witness but hold onto your
15 hat because he's also going to give opinions
16 in the context of his fact testimony.

17 Well, I just have a lot of
18 problems with that as a conceptual thing. If
19 you're testifying as a fact, you're testifying
20 as a fact. One of the facts might be that I
21 considered X, Y, Z, which was the opinion of
22 Dr. So, and So and So, but to come in and say

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1 that part of my factual testimony is that I
2 have formed an expert's opinion with respect
3 to this person, I have difficulty with that.

4 MR. LYON: And, Your Honor, may I
5 be heard for a second on that?

6 ADMIN. JUDGE SIPPEL: Well, yes.
7 You can, but let me finish with the Bureau
8 first.

9 MR. SCHONMAN: Your Honor, I don't
10 think it's unusual that a witness can appear
11 as a fact witness and offer an expert opinion
12 on a matter. Detective Shilling as my co-
13 counsel has indicated has personal knowledge
14 about the situation involving Mr. Titus. In
15 addition, he is a recognized expert. He has
16 testified as an expert in several courts on
17 the matters that he has knowledge about. So,
18 to the extent that he can offer an expert
19 opinion on the subject, it would certainly
20 assist Your Honor in advancing your ability to
21 make an appropriate decision, ultimate
22 decision in this case.

1 I think Your Honor would probably
2 be doing a disservice by not recognizing him
3 as an expert to the limited extent that we're
4 asking because it would certainly assist the
5 trier of fact here.

6 ADMIN. JUDGE SIPPEL: Well, I'm
7 not convinced yet.

8 He may be, again, I'm saying this
9 hypothetically for the purpose of this
10 morning, but he may be a lay witness when the
11 context of his work and experience can offer
12 an opinion, but that's not necessarily an
13 expert's opinion.

14 MR. KNOWLES-KELLETT: Your Honor,
15 I think when you talk to him, you're going to
16 be fine. And, you know, if you're not, you
17 can do with it as you please, you know.

18 ADMIN. JUDGE SIPPEL: Well, I'm
19 not trying to pin anything against the man.
20 I'm not doing that at all. It's just that
21 he's coming into this case in a context
22 different from the context in which the Titus

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1 expert is coming in. That's all I'm saying.
2 And you're asking me to sit here and peel the
3 onion and at some point I'm gong to say, wow.
4 This gentleman is an expert. And I'd say I am
5 reluctant to sit here this morning and give
6 you that kind of an assurance. I certainly am
7 going to listen to his testimony. I'm not
8 going to cut him off.

9 MR. KNOWLES-KELLETT: Great.

10 ADMIN. JUDGE SIPPEL: As long as
11 he's -- well, I'm not going to cut him off as
12 long as there is a foundation for what he's
13 saying. I mean, but I'm not going to cut him
14 off just because of what I'm talking about,
15 the procedural problem I'm having right now.

16 But before I go and say anything
17 further, let me hear from Mr. Titus' counsel.

18 MR. LYON: Sure, Your Honor.

19 There are a number of problems
20 here. The first is that is really a
21 fundamental fairness problem.

22 Under Rule 26 of the Federal Rules

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1 of Civil Procedure, an expert's testimony has
2 to be supported by a report with various
3 documentation as to his qualifications
4 delivered beforehand. That was the procedure
5 that you prescribed here. We followed it. We
6 designated an expert witness, but the Bureau
7 didn't.

8 As to whether Mr. Shilling is a
9 fact witness or an expert witness, I think
10 it's good to hear what Mr. Shilling himself
11 says.

12 He says on page six of 10, "in my
13 opinion as an expert in the area of law
14 enforcement involving sex offenders and their
15 risk of reoffense, the model that the
16 committee members selected in which the
17 Seattle Police Department uses today is one of
18 the best available actuarial models for
19 performing risk assessment."

20 That sets a foundation for the
21 risk assessments that he himself did which, of
22 course, requires expertise.

1 Now, I think it's important to
2 note. He never specifically states what model
3 it is so there's a difficulty there as to how
4 I'm supposed to cross examine him on testimony
5 that he didn't get. Beyond that, on page
6 eight of 10 he goes, " in my professional
7 opinion, despite the length of time since his
8 last conviction, David L. Titus currently
9 presents a high risk to reoffend."

10 That is opinion testimony. It's
11 expert testimony. Those are only the two most
12 blatant examples of opinion.

13 I went through this exhibit last
14 night and delineated everything that appeared
15 to me to be either opinion or fact testimony
16 based on expertise. And, Your Honor, there's
17 less than half a page of pure fact, most of
18 which is not in dispute. The fact that Mr.
19 Titus committed the sex offense when he was a
20 teenager, that he had some juvenile
21 adjudications, and the fact that it's been 16
22 years or so since his last offense and the

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1 fact that there was an incident of which Mr.
2 Shilling has no personal knowledge, but which
3 we'll stipulate occurred at Mercer Island
4 where Mr. Titus was questioned by the Mercer
5 Island Police because he was using the
6 bathroom in a closed park.

7 And so I don't see how it's
8 possible --

9 ADMIN. JUDGE SIPPEL: What was the
10 year of that in a closed park? Bathroom used
11 in a closed park?

12 MR. LYON: I think it was about
13 three to four years ago.

14 ADMIN. JUDGE SIPPEL: All right.

15 MR. LYON: So, we have the
16 fairness question that I haven't been afforded
17 the same rights that the Bureau has had with
18 respect to designation of an expert. But
19 beyond that, the witness just simply is not a
20 fact witness. Everything he knows is not from
21 his personal knowledge but from hearsay or his
22 work based on his supposed expertise. And he

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1 may be an expert. I have some questions about
2 that. I don't think it's been proven from his
3 r  sum  .

4 But, you know, that's what brought
5 -- I admit. That's what voir dire is for.
6 But I think the fundamental question is,
7 should he be allowed under the procedural
8 rules that you specified based on the
9 commission's rules which specify in turn the
10 Federal rules as a guiding light whether he
11 should be allowed to testify as an expert.

12 ADMIN. JUDGE SIPPEL: What's the
13 Bureau's position?

14 MR. KNOWLES-KELLETT: We didn't
15 retain or employ --

16 ADMIN. JUDGE SIPPEL: Well, I
17 understand, but what is your position? I
18 mean --

19 MR. KNOWLES-KELLETT: The Federal
20 Rule of Civil Procedure says --

21 ADMIN. JUDGE SIPPEL: No. You're
22 not answering my question.

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1 What is your position with respect
2 to him being proffered as an expert for
3 purposes of this case?

4 MR. KNOWLES-KELLETT: In large
5 part he's not an expert. But many of the
6 things Mr. Lyon says that we're having him
7 testify as an expert, it's his job as a police
8 officer to do these risk assessments.

9 ADMIN. JUDGE SIPPEL: All right.

10 MR. KNOWLES-KELLETT: He doesn't
11 pick a model that the retainer employed -- Mr.
12 Lyon's expert who he hires then proffers what
13 scientific tools he's going to use to issue
14 it's opinion. Normal course. This expert, we
15 didn't pick any tools for him. He didn't pick
16 any tools for him. He's required by law to
17 use the Washington State Assessment tool which
18 is made of particular models.

19 I don't think Mr. Lyon deposed
20 him. Mr. Lyon didn't even call him is my
21 guess and I think he would be happy to talk to
22 him about what model he uses. But I don't

1 think it's the same sort -- there's no
2 obligation by the Bureau under the Federal
3 Rule of Civil Procedure because we didn't
4 retain or employ an expert.

5 This guy has special expertise
6 that should come in under the Rules of
7 Evidence, but we didn't retain or employ one.

8 ADMIN. JUDGE SIPPEL: Well, and I
9 think I hear that. But I'm saying, you're not
10 proffering him as an expert. That's my
11 question. Right not my question right now is,
12 is he being proffered or are you attempting to
13 proffer him as an expert testimony?

14 And my first concern is with
15 respect to the fairness question that we're
16 talking about, Mr. Lyon is talking about.

17 MR. KNOWLES-KELLETT: Well, we
18 told Mr. Lyon before Dr. Allmon's testimony
19 that Detective Shilling had special expertise
20 and that we would be showing him Dr. Allmon's
21 report for comments.

22 MR. LYON: But, Your Honor, they

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1 never designated him as an expert.

2 ADMIN. JUDGE SIPPEL: I
3 understand.

4 MR. LYON: And they told me that
5 he was a fact witness. I have no problem that
6 they want to show him the testimony.

7 ADMIN. JUDGE SIPPEL: I
8 understand.

9 MR. LYON: I showed my client the
10 testimony. I showed Officer Steele the
11 testimony as well. But I don't think the fact
12 that they're not paying him matters as to
13 whether an expert's report ought to be
14 required.

15 ADMIN. JUDGE SIPPEL: Well, I hear
16 you. I hear you. I'm saying that in some
17 cases an expert will be hired solely for the
18 purpose of reviewing things and then you'll
19 have another expert who is going to testify is
20 hired as to testifying. And you don't get a
21 chance to depose the first kind of expert to
22 the degree that you can the second kind of

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1 expert.

2 In fact, I don't even know. You
3 might be able to depose that kind of expert at
4 all because he's basically preparing for
5 trial. It's trial preparation material.

6 But I don't want to get aside from
7 the point. My question is a basic fundamental
8 question and I didn't mean to cut anybody off
9 here.

10 But the Bureau's position is as
11 I'm reading the document is that he's
12 primarily a -- Mr. Shilling now, Detective
13 Shilling is primarily an expert witness who
14 happens to have some degree of expertise in
15 certain areas as you're saying.

16 MR. SCHONMAN: Yes, Your Honor.

17 ADMIN. JUDGE SIPPEL: He's being
18 proffered as --

19 MR. SCHONMAN: Detective Shilling
20 is proffered as a fact witness. He is and he
21 states this at page two of his testimony. "I
22 am the Seattle Police Department's designated

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